85-1412

No. 85-1251

Supreme Court, U.S.
FILED
FEB 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF TEXAS,

Petitioner,

v.

DANNY E. HILL, 47TH DISTRICT ATTORNEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO CROSS-PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD:

WM. CHARLES BUNDREN
Jackson, Walker, Winstead, Cantwell & Miller
6000 InterFirst Plaza
901 Main Street
Dallas, Texas 75202
(214) 953-6039

RODERIC G. STEAKLEY
Shank, Irwin & Conant
4100 Thanksgiving Tower
Dallas, Texas 75201

J. SHELBY SHARPE
Gandy, Michener, Swindle, Whitaker & Pratt
2501 Parkview Drive, Suite 600
Fort Worth, Texas 76102

February 21, 1986

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APPENDIX ITEM 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DONALD F. BAKER, *Plaintiff-Appellee,* VS. HENRY WADE, District Attorney of Dallas County, Texas, Etc., ET AL., DANNY E. HILL, 47th District Attorney, *Defendant-Appellant.*	NO. 82-1590

AFFIDAVIT OF JOSEPH G. WERNER

STATE OF TEXAS }
COUNTY OF DALLAS } SS.:

My name is Joseph G. Werner. I am over the age of 18 years. I am a practicing attorney, member of the State Bar of Texas and a member in good standing of the Bar of this Court. I have personal knowledge of the facts and statements contained in this Affidavit, and am competent to make this Affidavit. I am an Assistant City Attorney for the City of Dallas, Texas. I was an Assistant City Attorney for the City of Dallas, Texas, at the time the above-referenced matter was tried in Judge Jerry Buchmeyer's Court on or about June 15 and 16 of 1981. I was designated by Judge Jerry Buchmeyer as the lead trial counsel for the Defendants in the above-referenced matter when it was tried. I appeared as attorney of record at the trial of the above-referenced matter for Defendant Lee Holt, City Attorney for the City of Dallas, Texas.

Sue Lagarde and C.J. Baldree appeared for Defendant, Henry Wade, at the trial of the above-referenced action. Pursuant to the trial court's order, I directed the defense for the Defendants and was the lead counsel for Defendants.

A review of my file in this action confirms my recollection that the Attorney General of Texas did not participate in pretrial discovery, did not participate in the formulation of defensive strategies, did not call any witnesses at trial and generally did not vigorously defend the validity of the statute in question.

In my opinion there was a meritorious appeal from the adverse judgment of the trial court based on the Plaintiff's standing and on the absence of a constitutionally protected right of privacy to engage in private consensual homosexual conduct.

Dated this 9th day of October, 1984.

/s/ JOSEPH G. WERNER

Joseph G. Werner, *Affiant*

STATE OF TEXAS
COUNTY OF DALLAS } ss.:

On this 9th day of October, 1984, before me, the undersigned authority, personally appeared JOSEPH G. WERNER, known to me to be the person whose signature and Affidavit appear above, and being duly sworn under oath, he stated to me that the foregoing Affidavit is true and correct in all respects.

/s/ CHARLOTTE M. JOHNSON

Notary Public in and for
the State of Texas

(Printed name of Notary)

My Commission Expires:
5-1-85

APPENDIX ITEM 2

THE ATTORNEY GENERAL OF TEXAS

March 9, 1983

Mr. Gilbert F. Ganucheau
Clerk, United States Court of Appeals
For the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: *Baker v. Wade*, No. 82-1590
United States Court of
Appeals

Dear Mr. Ganucheau:

The State of Texas has previously filed notice of appeal in this matter and we are operating under our briefing schedule which requires the filing of the State's brief the week of March 14, 1983. The State of Texas has concluded not to further prosecute this appeal. We are aware that a notice of appeal has been filed by Mr. Hill, the District Attorney of Potter County and we have advised him of our determination not to further prosecute the appeal. I assume you will be hearing directly from his office as to his intentions with respect to a continuation of the appeal on behalf of his office.

If you require any more formal filing on our part in this matter, please advise.

Respectfully,

/s/ David R. Richards
David R. Richards
Executive Assistant

cc: Jim Barber
Donovan Campbell
Danny Hill
William Charles Bundren
United States District Clerk
Northern District, Dallas Division
Henry Wade, District Attorney
of Dallas County
Lee E. Holt, City Attorney
of Dallas County

APPENDIX ITEM 3

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DONALD F. BAKER V. HENRY WADE, et al	NO. 82-1590

MOTION TO WITHDRAW APPEAL

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT:

COMES NOW the State of Texas in the above entitled and numbered action, and in keeping with earlier communications to the Court, hereby moves to withdraw the appeal of the State of Texas in this matter, advising the Court that the State of Texas will not further prosecute this appeal. I am authorized to represent on behalf of the Appellees that they have no objection to the withdrawal of the appeal of the State of Texas in this matter.

WHEREFORE, PREMISES CONSIDERED, your Movants respectfully pray that the appeal of the State of Texas in this matter be dismissed.

Respectfully submitted,

JIM MATTOX,
Attorney General of the State of Texas

By /S/ DAVID R. RICHARDS

David R. Richards
Executive Assistant
Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-6139

By affixing his signature to the above and foregoing Motion To Withdraw Appeal, David R. Richards certifies that a true and correct copy of same has been forwarded by United States Mail, postage prepaid on this the 15 day of March, 1983 to Jim Barber, Law offices of James Barber, 318 Merchants State Bank Building, 5217 Ross Avenue, Dallas, Texas 75206 and upon Danny Hill, District Attorney, Potter County Courthouse, Amarillo, Texas 79181.

ENTRY OF DISMISSAL

Pursuant to the foregoing motion of appellant (State of Texas), Rule 42, FRAP, and Rule 9 of this Court, the above referenced appeal was duly entered dismissed this 18th day of March, 1983.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By /s/ H. E. ADAMS, JR.
Henry E. Adams, Jr.
Deputy Clerk

APPENDIX ITEM 4

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82-1590

DONALD F. BAKER,

Plaintiff-Appellee,

versus

HENRY WADE, District Attorney of Dallas County, Texas, Etc.,

Defendants,

DANNY E. HILL, 47th District Attorney,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

ORDER:

IT IS ORDERED that appellant's motion to intervene and substitute class representative is GRANTED.

IT IS FURTHER ORDERED that the motion of amicus curiae, Dallas Doctors Against A.I.D.S., Incorporated, for an extension of time within which to file their brief for a period of 30 days from the date of this order is GRANTED.

IT IS FURTHER ORDERED that appellee's motion to strike appendices to brief of appellant is carried with the case for later ruling.

[Dated: August 16, 1983]

/s/ E. GRADY JOLLY

United States Circuit Judge

APPENDIX ITEM 5

THE ATTORNEY GENERAL OF TEXAS

February 20, 1985

Mr. Gilbert Ganucheau
Clerk, United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: *Baker v. Wade*
No. 82-1590

Dear Mr. Ganucheau:

We have been advised that the Court has ordered that the above-captioned case be reheard *en banc*. The case involves the constitutionality of the Texas sodomy statute and the authority of the Attorney General of Texas to represent the State of Texas in such matters.

At this point, the State of Texas, represented by the Attorney General, is not a party to the litigation. It appears that 42 U.S.C. § 2403(b) permits the State to intervene as a party as a matter of right. If that is the case, the State of Texas does seek party status and will file a brief not later than March 29, 1985. If our interpretation of § 2403(b) is not correct, we will request leave to intervene as a party or, in the alternative, leave to appear as *amicus curiae*. We will await further direction from the Court.

Thank you for your assistance.

Sincerely,

Mary F. Keller
Special Assistant Attorney General

MFK:gs
cc: Counsel of Record

APPENDIX ITEM 6

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82-1590

DONALD F. BAKER,

Plaintiff-Appellee,

versus

HENRY WADE, District Attorney of Dallas County, Texas, ET AL.,

Defendants,

DANNY E. HILL, 47th District Attorney,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

ORDER:

The Attorney General of Texas has written a letter to the court stating that it appears that 28 U.S.C. § 2403(b) permits the State of Texas to intervene as a party as a matter of right, and if this be the case, that the State of Texas seeks party status and permission to file a brief with appellees.

In view of the fact that the Attorney General of Texas intervened in this case in the district court and then dismissed the appeal, he is directed to file a brief on or before March 29, 1985, which shall include a resume of the procedural history of the case and shall address the question whether the State of Texas now has a right to intervene in an appeal which the State's Attorney General once dismissed. In the alternative, if intervention by the State

of Texas is not sought on the basis of right, then the brief shall assert the basis on which intervention is sought. The brief may also deal with the merits of the appeal as regards the constitutionality of the statute attacked and the authority of the Attorney General of Texas to represent the State in this matter.

[Dated: March 4, 1985]

/s/ CHARLES CLARK

Chief Judge

APPENDIX ITEM 7

JACKSON, WALKER, WINSTEAD, CANTWELL & MILLER
Attorneys and Counselors
43rd Floor InterFirst One
1401 Elm Street
Dallas, Texas 75202
(214) 655-2911

February 25, 1985

Gilbert F. Ganucheau, Clerk
United States Court of Appeals
Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Appeal Cause No. 82-1590
Donald F. Baker v. Henry Wade, et al
In the United States Court of Appeals for the Fifth Circuit

Dear Mr. Ganucheau:

This letter is in response to the letter of February 20, 1985, to you from Mary F. Keller, Special Assistant Attorney General for the State of Texas. In Ms. Keller's letter she stated that 42 U.S.C. Section 2403(b) (sic) appears to permit the state to intervene as a party as a matter of right. That statement is incorrect.

On February 25, 1985, I talked with Ms. Keller by phone and she informed me that the State did not intend to take a position with respect to the constitutionality of Section 21.06 of the Penal Code of the State of Texas, the Statute in question. Consequently, for that reason alone, the State's intervention in the appeal of this case could not assist the Court in any way.

More importantly, however, 28 U.S.C. §2403(b) does not authorize the Attorney General to intervene in a case such as this and, furthermore, does not authorize any specific notice to the attorney

general. Only those situations in which no agency, officer or employee of the State is a party will entitle the Attorney General to intervene. The legislative history discussing §2403(b) clearly states that it was not the intent of Congress to allow the Attorney General to intervene or to give the Attorney General notice if any agency, officer or employee of the State was already a party.

In *Spielman Motor Co. v. Dodge*, 295 U.S. 89 (1935), the United States Supreme Court concluded that local officers performing a state function, such as the district, county and city attorneys sued in this case, are proper parties and that the Attorney General did not have a right to intervene.

Because the Plaintiff chose to sue a class of all district, county and city attorneys in the State of Texas, and those parties are employees of the State, §2403(b) is inapplicable to this situation.

For these reasons, Appellant, Danny Hill, opposes the apparent request for intervention as a matter of right by the Attorney General. Furthermore, Danny Hill opposes the Attorney General's intervention as a party or for leave to appear as amicus curiae.

Thank you for your attention and consideration.

Very truly yours,

/s/ Wm. Charles Bundren

Wm. Charles Bundren

APPENDIX ITEM 8

Tex. Penal Code §21.01:

> (1) "Deviate sexual intercourse" means any contact between any part of the genitals of one person and the mouth or anus of another person.

APPENDIX ITEM 9

Tex. Penal Code §21.06:

(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.

(b) An offense under this section is a Class C misdemeanor.

APPENDIX ITEM 10

28 U.S.C. §2403(b):

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

APPENDIX ITEM 11

Texas Constitution, Art. 5, §21:

> A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of four years. In a case of vacancy the Commissioners Court of the county shall have the power to appoint a County Attorney until the next general election. The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature. The Legislature may provide for the election of District Attorneys in such districts, as may be deemed necessary, and make provision for the compensation of District Attorneys and County Attorneys. District Attorneys shall hold office for a term of four years and until their successors have qualified.

APPENDIX ITEM 12

Tex. Code Crim. Proc. Ann. art. 2.01:

> Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely. When any criminal proceeding is had before an examining court in his district or before a judge upon habeas corpus, and he is notified of the same, and is at the time within his district, he shall represent the State therein, unless prevented by other official duties.